**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

# Decision



**Matter of:** Serv-Air, Inc.; Kay and Associates, Inc.

**File:** B-258243; B-258243.2; B-258243.3

**Date:** December 28, 1994

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Thomas J. Madden, Esq., James F. Worrall, Esq., and Jerome S. Gabig, Jr., Esq., Venable, Baetjer, Howard & Civiletti, for Beech Aerospace Services, Inc., an interested party.
William P. McGinnies, Esq., Arthur I. Rettinger, Esq., and Marc J. Weinberger, Esq., Department of the Treasury, U.S. Customs Service, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

1. Protest against agency's failure to discuss with protester its apparent willingness to cap its general and administrative (G&A) rates is sustained where proposal indicated a willingness to accept a ceiling on those rates and agency mistakenly believed that its concerns about the G&A rates and cap had been raised with the firm.

2. Protest alleging that agency conducted an improper cost evaluation by adjusting protester's cost for realism and assessing the risk to the government that the protester would have difficulty retaining personnel is denied where solicitation provided for such a cost realism adjustment and risk assessment.

3. Where protester learns of specific grounds of protest from a debriefing but fails to raise those grounds until after agency's report responding to a general allegation contained in initial protest, the specific grounds are untimely and will not be considered.

4. Allegation that agency waived a mandatory requirement for the awardee is denied where the record shows that the agency interpreted the requirement in a

flexible manner for both the protester and awardee and the protester was not prejudiced by the agency's approach to the evaluation of the requirement.

## DECISION

Serv-Air, Inc. and Kay and Associates, Inc. protest the award of a contract to Beech Aerospace, Inc., under request for proposals (RFP) No. CS-94-004, issued by the United States Customs Service, Department of the Treasury, for aircraft maintenance and related services. Serv-Air, the incumbent contractor, alleges in two protests that the agency unreasonably evaluated its proposal, failed to conduct proper discussions, waived a mandatory requirement for Beech, and failed to adequately justify the selection of the awardee at a higher cost. Kay contends principally that the agency failed to conduct proper discussions with it concerning its cost and technical proposal.

We sustain Kay's protest in part, deny it in part and dismiss it in part. We dismiss in part and deny in part Serv-Air's protests.

BACKGROUND

The RFP contemplated the award of a cost-plus-award-fee contract for a base year and 4 option years. The aircraft to be maintained under the contract are used by the Customs Service to detect, interdict, track, and apprehend aircraft, marine, and land vehicles attempting to smuggle contraband into the United States. The RFP provided that the contractor "shall provide program management, aircraft maintenance, logistics, supply and Electronic Data Processing (EDP) support requirements necessary to ensure that Customs has the numbers, types and properly configured aircraft available where and when required to meet all Customs aviation operational commitments."

The RFP set forth the following technical evaluation factors, which were to be weighted higher than cost in the selection decision:

(1) Technical Approach
    Staffing
    Methodology
    Past Performance
(2) Quality Management
(3) Phase-In and Phase-Out

Factors (1) and (2) were of equal importance and "four times greater than" factor (3). The subfactors under factor (1) were of equal importance.

Cost proposals were to be evaluated for allowability, allocability, realism, and risk. The RFP provided that most probable cost adjustments would be made to the offerors' proposed costs "based upon the determination that a given cost is unrealistically high or low. . . ." It stated further that the agency "is concerned with the quality and stability of the work force to be employed on this contract. . . . The cost proposal will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with the Technical Proposal." The RFP provided that the award would be made to the offeror "whose proposal offers the best value to the Government in terms of technical and cost rather than to the proposal offering the lowest estimated cost."

The agency received six proposals by the December 29 closing date. Four proposals, including the protester's and the awardee's, were included in the competitive range. Following discussions, the agency requested and received best and final offers (BAFO). Customs considered Beech's proposal to be technically superior to the others and considered Kay's to be superior to Serv-Air's. The agency's estimated cost of awarding the contract to Serv-Air was $145,750,224, the estimated cost of awarding to Beech was $155,870,088, and the estimated cost of awarding to Kay was $169,148,044. The Customs source selection official determined that Beech's proposal presented the best value, and the agency awarded the contract to Beech on August 12, 1994.

KAY'S PROTEST

Kay argues principally that the agency improperly failed to conduct discussions concerning Kay's willingness to cap its general and administrative (G&A) costs. We agree with the protester and sustain the protest on this issue. The protester raises three other grounds of protest. As discussed below, one of these grounds is denied, and two are dismissed as untimely.

Kay's G&A Costs

Kay's initial cost proposal set forth its historic G&A rates for 1991, 1992, and 1993 at approximately [DELETED] percent and offered G&A rates of [DELETED] percent for labor and [DELETED] percent for materials for the years 1994-1999. The proposal stated that Kay considered those rates to be reasonable "given the business volume assumptions (including the impact of this contract) during the forecast period." The proposal also stated that "[Kay] will accept a G&A ceiling rate arrangement in any contract awarded as a result of this proposal."

By letter dated February 4, 1994, Customs provided Kay with a number of discussion questions concerning its cost proposal. None of the questions concerned Kay's proposed G&A rates.

On February 16, Customs requested that the Defense Contract Audit Agency (DCAA) conduct an audit of the indirect rates contained in Kay's proposal. By letter dated March 25, to Customs, DCAA responded that upon "review of the request and the [Kay] proposal package" a field audit "would not be necessary." DCAA reviewed the Kay cost proposal but did not meet with Kay or discuss the proposal with Kay. The letter summarized DCAA's findings, in pertinent part, as follows:

> "The only indirect rate involved is a proposed ceiling G&A rate of:
>
> [DELETED]% on reimbursable material
> [DELETED]% on reimbursable labor and ODCs [other direct costs]"

The letter noted that those rates are significantly lower than "recent actuals" and concluded as follows:

> "The proposed ceiling rates are considered reasonable and acceptable, so long as they are to be ceilings. It appears that a new group of `site locations' would be involved if this procurement is awarded to [Kay] and it is reasonable to assume a lower than normal G&A would be appropriate."

The March 25 letter was not provided to Kay, and Customs did not discuss the DCAA concerns with Kay.

In its BAFO, Kay lowered its proposed G&A rates for labor and materials for all years of the contract to [DELETED] and [DELETED] percent, respectively. The BAFO stated further:

> "Kay and Associates, Inc. is being considered for numerous contracts that would substantially increase business volume. In recognition of these proposals and our potential for award, Kay and Associates, Inc. has passed the savings to U.S. Customs Service by decreasing our G&A rate on labor and materials."
>
> "[Kay] will accept a G&A ceiling rate arrangement in any contract awarded as a result of this proposal."

Kay's proposed cost was $142,202,069. Customs prepared a most probable cost for each offeror including adjustments to reflect the realistic cost to the government for the work to be performed. Kay's cost was adjusted to $169,148,044. [DELETED] of

the increase, approximately $[DELETED] million, resulted from Customs' decision to adjust Kay's G&A rate to [DELETED] percent.

Customs's most probable cost evaluation explains the adjustment as follows:

> "DCAA questioned the G&A rate of [DELETED]% proposed by [Kay] . . . . The offeror proposed to enter into an agreement capping G&A after contract award and at the same time proposing a yet lower rate of [DELETED]%. . . . [T]he government does not accept the lower rate and adjusted the offeror's proposed cost using the prior year G&A rate of [DELETED]%. After DCAA debriefing, the offeror had the opportunity to cap the proposed G&A during BAFO. Instead the offeror still proposed an agreement [at] contract award."

Kay argues first that the agency erred in failing to give Kay credit for proposing to cap its G&A rates. It states that its probable cost should not have been adjusted since its proposal stated that it would cap those costs; consequently, according to Kay, G&A costs exceeding the specified levels would not be passed on to the agency. Kay argues further that to the extent Customs did not understand its proposal as providing for a cap or ceiling, the agency was required to bring this to Kay's attention before increasing its probable cost. Kay concludes that the agency, as a result, misevaluated its cost proposal by adjusting it by approximately $[DELETED] million.

Customs and Beech argue initially that the language in Kay's proposal concerning a ceiling on its G&A rates was tentative and nonbinding and could not reasonably be read as an offer to cap its G&A rates. They also argue that there was no requirement for the agency to hold discussions concerning the cap.[1] In this respect, Customs asserts that the failure of Kay "to use contractually enforceable language"

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[1]Customs and Beech also argue that the protester's argument that the agency failed to discuss the alleged ceiling on G&A rates is untimely. We disagree. Kay's initial protest, filed within 10 days of a debriefing at which Kay was advised that Customs had substantially adjusted Kay's G&A costs, specifically raised the issue. The protest stated that, at the debriefing, Customs raised cost concerns with Kay's proposal "that had not been raised during negotiations. Namely, Customs stated its concerns with [Kay's] G&A costs, notwithstanding that [Kay] had explicitly stated in its proposal that it would accept a firm price ceiling for G&A." In the protest's "Legal Discussion" section, Kay argued that Customs failed to engage in meaningful discussions with Kay, again stating that at the debriefing the agency identified "cost concerns never previously raised which . . . caused Customs to increase [Kay's] most probable cost." We therefore conclude that the issue was timely raised.

was neither a weakness, excess, nor deficiency and therefore did not need to be the subject of discussions. The agency concludes that if Kay "wanted to cap its G&A rates, presumably, [it] knew how to do so."

When agencies evaluate proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) § 15.605(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed cost represents what the contract should cost, assuming reasonable economy and efficiency. MAR, Inc., B-255309.4; B-255309.5, June 8, 1994, 94-2 CPD ¶ 19. As a general rule, however, the maxim that the government bears the risk of cost overruns in the administration of a cost-reimbursement contract is reversed when a contractor agrees to a cap or ceiling on its reimbursement for a particular category or type of work. Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 ¶ 202. An offeror that proposes a cap has shifted the risk of cost overruns away from the government, such that upward adjustments to capped costs are improper, unless the caps are ineffective or can be circumvented. Id.

For these reasons, agencies typically identify to offerors concerns they may have about unrealistically low cost categories and often take affirmative steps to negotiate ceilings on such costs during discussions to prevent cost overruns. See Compliance Corp., B-254429, B-254429.2, Dec. 15, 1993, 94-1 CPD ¶ 166; University Research Corp., B-253725.4, Oct. 26, 1993, 93-2 CPD ¶ 259. In this regard, the FAR provides for negotiating advance agreements on the treatment of costs which are expected to be questionable in order to preclude, to the extent possible, disputes during the administration of a contract, thus eliminating the need to litigate such matters. Mandex, Inc., B-241841, Mar. 6, 1991, 91-1 CPD ¶ 253; FAR § 31.109. The agency did not do that here. Instead, it simply increased Kay's evaluated cost by nearly $[DELETED] million, without regard to the potential savings suggested by Kay's expressed willingness to accept a cap. Under the circumstances, we conclude that Customs did not satisfy its obligation to conduct meaningful discussions with Kay.

In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are included in the competitive range. FAR § 15.610. Although discussions need not be all-encompassing, discussions are required to be meaningful; that is, the agency must lead offerors into the areas of their proposals which require amplification or correction. Jaycor, B-240029.2 et al., Oct. 31, 1990, 90-2 CPD ¶ 354. In this regard, the agency is required to point out weaknesses, excesses, or deficiencies in a proposal unless doing so would result in technical transfusion or leveling. FAR § 15.610(c) and (d); Innovative Training Sys., B-251225.3, Oct. 19, 1993, 93-2 CPD ¶ 232. This obligation is not met where an

agency's discussion questions concern relatively insignificant aspects of the agency's evaluation without apprising the offeror of the principal deficiencies in its proposal. Columbia Research Corp., B-247631, June 22, 1992, 92-1 CPD ¶ 539.

Under this standard, the agency should have provided Kay with an opportunity to clarify and formalize its intent to cap its G&A rates. The record shows that Kay submitted a competitive proposal and that the agency pursued detailed discussions with Kay concerning both cost and technical aspects of its proposal. While relatively minor weaknesses were raised during discussions,[2] the agency failed to question the proposal's reference to G&A ceiling rates. Without the $[DELETED] million adjustment for G&A, Kay's overall evaluated cost would have been approximately $[DELETED] million, less than Beech's overall evaluated cost of $155,870,088. With the adjustment for G&A, however, Kay's overall evaluated cost was substantially higher than that of Beech; obviously, this adjustment could have had a material impact on the selection decision. Given Kay's willingness to cap its G&A rates and the agency's conclusion that Kay had not in fact capped those rates, we find unreasonable the agency's failure to raise with Kay its concerns about Kay's proposed G&A costs. We note, in this regard, that Customs did raise its concerns with Beech about that firm's overhead and indirect costs and specifically requested a breakdown of overhead rates.

Although the agency states that Kay's willingness to cap its G&A rates was not required to be discussed, the contemporaneous evaluation record shows that the agency intended that Kay be notified of the agency's concerns on this issue. The cost evaluators were under the mistaken impression that Kay had been given a "DCAA debriefing" which had afforded the protester the opportunity to clarify its position concerning the appropriate G&A rates. Also, the agency's cost evaluation record for Kay characterizes Kay's cost proposal as "high risk" and states that "DCAA questioned the G&A rate proposed" and that "the offeror was debriefed by DCAA." Indeed, even during much of the development of the record in this protest, the agency and interested party argued that DCAA's view of Kay's G&A rates and the ceiling language in Kay's proposal had been communicated to Kay, so that the agency was relieved of its responsibility to raise the issue with Kay during discussions.[3] In fact, no debriefing occurred. Instead, DCAA sent the agency a

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[2]For example, Customs questioned aspects of Kay's cost proposal such as paying a clerk an hourly wage below the minimum wage and failing to show elements of phase-in travel expenses which were expressed as a fixed unit price.

[3]Referring to the March 25 DCAA audit letter, Customs stated in one submission to this Office that Kay "was clearly put on notice that its trial balloon regarding a ceiling contained in its initial proposal was not a firm offer of a ceiling."

(continued...)

letter which characterized the G&A rates as "proposed ceiling rates" and essentially suggested that the agency should confirm that they are firm ceilings. In addition, the DCAA letter stated further "it is reasonable to assume a lower than normal G&A would be appropriate." This letter was not provided to Kay nor did the agency bring its or DCAA's concerns to the attention of Kay before substantially increasing Kay's probable cost.

While generally offerors bear the burden for failing to submit adequately written proposals, this does not excuse an agency from its obligation under the FAR to conduct meaningful discussions. We agree that Customs could reasonably conclude that Kay's proposal did not contain a contractually binding cap on its G&A rates; nevertheless, the agency could not reasonably consider that it had no obligation to discuss the matter with Kay. Kay had no reason to further explain its G&A rates or to provide a firm cap for these rates unless the agency advised Kay of its view that Kay's proposed G&A costs were significantly understated and not effectively capped.

Other Issues

Kay also alleges that Customs failed to conduct meaningful discussions concerning its technical proposal. Specifically, it asserts that the agency failed to raise during discussions concerns Customs had about Kay's use of part-time personnel on weekends, its buying methodology for aircraft parts, its hazardous material reporting plan, and the complexity of its EDP system. Kay states that all of these concerns were listed in the evaluation record as weaknesses in Kay's technical proposal, yet none of these weaknesses was discussed.

Based on our review of the record, we find nothing improper in the agency's conduct of technical discussions. First, Kay's use of part-time personnel was first introduced in its BAFO. Where problems are introduced in a BAFO, the agency is not obligated to reopen discussion so that an offeror may remedy the defects. State Technical Institute at Memphis, B-250195.2; B-250195.3, Jan. 15, 1993, 93-1 CPD ¶ 47. Second, with respect to buying methodology, in our view, the agency sufficiently led Kay into this area of concern by asking four questions concerning the role of Kay's buyer and buying methodology.

The final two weaknesses, concerning Kay's hazardous material reporting plan and EDP, did not have a significant adverse impact on the proposal's technical rating in the context of the entire evaluation. With respect to the reporting plan, the

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[3](...continued)
Subsequently, the agency conceded that it "was mistaken in its belief that [the March 25] letter had been supplied to [Kay]."

evaluators noted that Kay proposed an oral as opposed to a written reporting system. We agree with Customs that this weakness was insignificant, since the agency considered Kay's approach to be acceptable as proposed and the requirement appears to be a minor part of the contract. Concerning Kay's EDP system, the evaluators rated it "outstanding" in terms of staffing, methodology, and past performance. Since discussions need not be all-encompassing, we will not object to the agency's decision not to discuss these relatively minor issues and deny this protest ground. Booz, Allen & Hamilton, Inc., B-249236.4; B-249236.5, Mar. 5, 1993, 93-1 CPD ¶ 209.

Kay raises two other protest bases. First, Kay contends that Customs improperly evaluated its cost proposal by adjusting its cost based upon anticipated G&A costs associated with Kay's "other direct costs" (ODC). This argument is based on Kay's review of the agency cost evaluation. Second, the protester complains that the agency's methodology for arriving at consensus ratings under the technical evaluation was unreasonable and inconsistent. Kay's argument is based on its review of the adjectival ratings assigned by the evaluators under each of the evaluation subfactors. Kay concludes that its overall technical consensus rating should have been "outstanding," rather than "good." We find these issues to be untimely.

Under our Bid Protest Regulations, protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1994). Here, Kay became aware of the agency's cost adjustment based on ODCs and the consensus rating methodology on September 12, when the agency provided copies of all documents relevant to the evaluation of Kay's cost and technical proposal and source selection. Since Kay did not raise these objections until October 12, these issues are untimely and will not be considered. Republic Environmental Sys., Inc., B-249898, Dec. 15, 1992, 92-2 CPD ¶ 417. While the protester argues that its initial protest should be read so as to encompass these allegations, we disagree. Based on a debriefing, Kay's protest raised specific challenges to the procurement. Neither the evaluation of ODCs nor the method of "rolling up" the evaluators' adjectival ratings was mentioned or suggested in the initial protest.

SERV-AIR'S PROTEST

Serv-Air raises numerous objections to the award in two separately filed protests. The protester contends that Customs unreasonably evaluated its cost and technical proposal, improperly evaluated Beech's proposal, and conducted an unreasonable cost/technical tradeoff. We have carefully reviewed the protest allegations and find them to be without merit or untimely. While our decision does not specifically

address each and every argument and subargument raised by the protester, each has been considered. We discuss below several of the protest issues raised.

Cost Evaluation of Serv-Air's Proposal

The evaluators found that Serv-Air had proposed reducing wage rates to levels below rates paid by Serv-Air as the incumbent under the current contract. They also noted that the protester proposed to lower the current escalation rate from [DELETED] percent to [DELETED] percent and reduce fringe benefits. Accordingly, Customs adjusted Serv-Air's estimated labor costs by approximately $[DELETED] million. Customs also adjusted the protester's proposed other direct costs by approximately $[DELETED] million. In addition, the evaluators stated that the current wages and benefits were insufficient to retain a qualified, skilled work force, noting a turnover rate of 17 percent under the current contract and concluded that Serv-Air's cost proposal presented a high risk to the government to retain a qualified, skilled, and stable work force.

The protester has presented no evidence showing the cost adjustments to be unreasonable. Rather, the protester contends that Customs imposed a "double penalty" on Serv-Air by deeming its cost proposal high-risk because of its proposed wage rates and benefits and, at the same time, upwardly adjusting its cost to reflect wages that the agency believed would ultimately have to be paid during the contract.

It is not the function of this Office to evaluate technical proposals de novo; rather, in reviewing protests against allegedly improper evaluations, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the evaluation criteria listed in the solicitation. Rome Research Corp., B-245797.4, Sept. 22, 1992, 92-2 CPD ¶ 194. A protester's disagreement with the agency's judgment is itself not sufficient to establish that the agency's evaluation was unreasonable. PHH Homequity, B-244683, Oct. 7, 1991, 91-2 CPD ¶ 316.

Here, the RFP provided that the cost proposal would be evaluated for allowability, allocability, realism, and risk and that the evaluation would include "an assessment of the offeror's ability to provide uninterrupted high-quality work." In this regard, as explained, an agency should conduct a cost realism analysis in order to determine what probable and realistic cost it expects to incur if it accepts a particular proposal. The cost adjustment that results from such an analysis, however, does not eliminate or ameliorate risks inherent in an offeror's contemplated approach since the agency's cost adjustment is for evaluation purposes only and does not alter the offeror's proposal to pay the lower rates. See Honeywell,Inc., B-238184, Apr. 30, 1990, 90-1 CPD ¶ 435. Thus, we do not think that a "double penalty" resulted from Customs upwardly adjusting Serv-Air's wages and benefits for cost realism purposes while at the same time concluding that those

wages and benefits, which Serv-Air proposed to pay, would present a high risk that the firm would not be able to retain a qualified, skilled work force.

Technical Evaluation of Serv-Air's
Proposal and Meaningful Discussions

In its comments on the agency's administrative reports,[4] Serv-Air alleged, for the first time, that the agency unreasonably downgraded its technical proposal based on specific perceived weaknesses in its approach to staffing. It also argued in its comments that the staff reductions which it proposed in its BAFO were justified based on reductions in the RFP requirements made prior to the agency's request for BAFOs and that the agency was obligated to reopen discussions after BAFOs to raise its staffing concerns with Serv-Air.

These arguments are untimely because they were not raised within 10 working days of when the protester knew of these protest grounds. 4 C.F.R § 21.2(a)(2).

The record shows that Serv-Air was aware of the agency's evaluation of its staffing and the fact that the agency had not discussed staffing with it at the time it filed its initial protest on August 19, but did not raise these issues until its comments nearly 2 months later. In this respect, on August 18, Customs provided Serv-Air with a thorough debriefing at which it disclosed the detailed staffing weaknesses in Serv-Air's proposal. Serv-Air's protest of August 19, containing 10 separate counts, did not identify any alleged impropriety in the agency's judgments about Serv-Air's proposed staffing. While the protest included a count called "arbitrary evaluation," that count primarily challenged the qualifications of the evaluators. With respect to the actual evaluation, it merely stated "[i]n addition, Customs' evaluation was erroneous and improper." No factual basis was provided for this conclusion. Similarly, the protest contained a count called "Lack of Adequate or Meaningful Discussions." It stated that the agency had identified 15 weaknesses at the debriefing and asserted that "Customs failed to raise these issues with Serv-Air in the regular course of discussions." The protest did not identify the nature of the weaknesses, nor did it contend that the agency was required to conduct post-BAFO discussions.

Our regulations require a protester to provide a detailed statement of the factual and legal grounds of protest. 4 C.F.R. § 21.1(b)(4). This requirement is intended to provide our Office and the contracting agency with a sufficient understanding of the grounds of protest and with the opportunity to expeditiously consider and resolve the protest with minimal disruption to the orderly process of government procurement. American President Lines, Ltd., B-236834.8; B-236834.9, May 15, 1991,

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[4]Serv-Air filed one set of comments on both reports.

91-1 CPD ¶ 470. Despite the fact that on August 18 the agency provided the protester with detailed information forming the bases of these allegations, the protester failed to raise the issues until its comments which it filed almost 2 months later. Since the protester did not raise these issues within 10 days of the debriefing, these issues are untimely, and we will not consider them.

Evaluation of Beech's Proposal

Serv-Air contends that the agency improperly waived a mandatory requirement for Beech by allowing Beech to take exception to the RFP requirement to "perform all . . . maintenance" for night vision goggles (NVG). Serv-Air states that Beech's proposal indicated that Beech would not perform certain depot level NVG maintenance and recommended that those services be subcontracted to the manufacturer or other approved vendor.[5]

The record shows that Beech and Serv-Air offered similar approaches to performing these requirements: each offered to perform depot-level maintenance using equipment available at the agency site and each indicated that depot-level maintenance requiring equipment not available from the government would be performed by the NVG manufacturer or other approved vendor.[6] The agency states that it found this approach to be acceptable for both offerors and that neither offeror was considered capable of performing all the required NVG services "in-house." The agency states further that the offerors were "judged similarly on the technical side with regard to maintenance of the night vision goggles." Thus, to the extent that the agency waived a mandatory requirement for the awardee, it also waived the requirement for Serv-Air. Accordingly, we conclude that the protester has failed to show that Customs's flexibility in interpreting the NVG depot-level

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[5]According to the RFP, depot-level maintenance is the "highest possible level of maintenance and consists of major overhaul, rework and repair of complete aircraft systems, avionics systems, sensor systems . . . ."

[6]Serv-Air proposed to perform depot-level maintenance at the government's San Angelo Aviation Branch, which the proposal stated should be designated as the "centralized Customs Level Two facility," and that "[m]aintenance requirements that exceed the capabilities of the Level Two facility will be coordinated with the manufacturer or other approved commercial vendor." Similarly, while Beech's proposal stated that its price "does not include the cost for D-level test equipment and training for NVG," it stated that Beech will perform the D-level maintenance "commensurate with available test equipment at a centralized location" and recommended that the D-level requirements be "subcontracted to the NVG manufacturer or other approved, qualified commercial or DOD vendors."

maintenance requirement was unreasonable or that it prejudiced the protester. Planning Sys. Inc., B-246170.4, Dec. 29, 1992, 92-2 CPD ¶ 445.

Source Selection Decision

Finally, Serv-Air challenges Customs' decision to award the contract to Beech, notwithstanding its higher cost. The protester states that, based on its review of the proposals and evaluation documents, it is unable to ascertain the cost difference and suggests that the difference between Serv-Air's estimated cost and Beech's higher cost is greater than the agency believed. Serv-Air also expresses general disagreement with the agency's cost/technical tradeoff.

Cost/technical tradeoffs may be made in selecting an awardee subject only to the test of rationality and consistency with the established evaluation factors. Maytag Aircraft Corp., B-237068.3, Apr. 26, 1990, 90-1 CPD ¶ 430. In performing such tradeoffs, an agency's source selection authority retains considerable discretion in determining the significance of technical rating differentials and their relationship to proposed costs. Loral Infrared & Imaging Sys., Inc., B-247127.3, July 13, 1992, 92-2 CPD ¶ 52.

Concerning the agency's judgment of the probable cost difference between the protester's and awardee's proposals, Serv-Air has not explained in any detail the basis for its conclusion that the agency's cost comparison was flawed. Based on our review, however, it appears that the protester fails to recognize that the agency adjusted its proposed "other direct costs" by nearly $[DELETED] million over the life of the contract, and the estimated probable costs appear to be reasonably based. The record also supports the agency's determination that Beech's technical proposal was superior to Serv-Air's, particularly with respect to its approach to staffing. In sum, Serv-Air's protest provides no basis for us to object to the cost/technical tradeoff decision.

RECOMMENDATION

Since we have found that Customs failed to conduct meaningful discussions with Kay, we recommend that the agency reopen discussions with Kay in order to ascertain the appropriate G&A rates to be used in determining the G&A costs which would be incurred if the agency accepted Kay's proposal. The agency should also conduct discussions with all other competitive range offerors and request new BAFOs. If, after evaluating the BAFOs received, Customs determines that an offeror other than Beech has submitted the most advantageous offer, Customs should terminate Beech's contract and award to that offeror. We also find that Kay is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f)(1),

Kay's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to Customs within 60 days after receipt of this decision.

The protest of Kay is sustained in part, denied in part, and dismissed in part. The protests of Serv-Air are dismissed in part and denied in part.

Comptroller General
of the United States